

Robert Mac-Nair, the Assured in a Policy of Insurance effected on the Ship *Jean* and her Cargo, - - - - - } Appellant in the Original
AND
Respondent in the Cross Appeal.

James Coulter and Others, Underwriters and
Representatives of all the Underwriters
(except *James Johnson*) on the said Ship
Fean and her Cargo, - - - - -

Respondents in the Original
AND
Appellants in the Cross
Appeal.

The CASE of the Respondents in the Original

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Appellants in the Cross Appeal.

IN the Year 1749 *Robert Mac-Nair*, the Appellant in the Original Appeal, was concerned in a Sugar House at *Glasgow* in *Scotland*, and being desirous of employing his Son *James Mac-Nair*, he resolved to send him out with an Adventure of Merchandize to *Barbadoes*; and to encourage him, and engage his Attention and Application to the Business, the said Appellant gave him One Fourth Share in the Adventure.

The Appellant *Robert Mac-Nair* then freighted a Ship at *Glasgow*, and shipped a Cargo on board her, with which *James Mac-Nair* proceeded to *Barbadoes*; where having arrived, he put his Cargo under the Care of Messieurs *Harvies*, Merchants there to whom he was addressed.

James Mac-Nair finding Difficulty at *Barbadoes* to sell to Advantage all the Merchandize he carried out, *Messieurs Harvies* recommended the sending what remained undisposed of to *Virginia*; and accordingly the same was shipped in a proper Vessel, and *James Mac-Nair* went in her as Supercargo.—At *Virginia* he disposed of the Whole of his Adventure, and purchased of *Messieurs Hutchins* and *Tucker*, Merchants there, a small Ship or Vessel called *The Jean*, not exceeding 80 Tons Burthen; for which, and her Boat, Tackle, and Apparel, he paid 450*l.* *Virginia* Currency (being equal to 360*l.* Sterling) as appears by the Bill of Sale made thereof to him dated 13th of *November* 1749.

On the 1st of November 1749 the said James Mac-Nair wrote a Letter to the Appellant Robert Mac-Nair dated at Virginia, wherein (*inter alia*) he says, " I have purchased a Vessel of Forty-seven Foot Keel for 350*l.* Current Money, and am now purchasing her Cargo for Barbadoes in order for purchasing Sugars."—Again, " This Vessel I have purchased; I believe she will answer you very well; she is a new Vessel, never was out to Sea yet, which will prove to your Contentment; her Name is *The Jean*."

James Mac-Nair having purchased *The Jean* ready fitted and equipped, he then got a Cargo for her, and proceeded therewith back to *Barbadoes*, and afterwards returned again to *Virginia*, where he then loaded another Cargo in *The Jean* to be carried to *Barbadoes*.—The Insurance made on *The Jean* and her Cargo for this last Voyage, being the Subject of the Dispute between the Parties, the Respondents therefore apprehend it will be necessary to state some Particulars and Circumstances attending the Voyage, Shipping of the Cargo, and the Insurance which was effected thereon.

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On

Letter of 7th May 1750.

On the 7th of May 1750 James Mac-Nair being at Virginia writes a Letter to his Father the Appellant Robert Mac-Nair, wherein, after mentioning several Particulars relative to the Disposal of the last Cargo, he proceeds to acquaint him with the Value of the Cargo which he then intended to ship for Barbadoes in the following Words (*viz.*) " You advised me to acquaint you of the Value I will have on board, in case you make Insurance.—She (meaning the Ship *Jean*) will carry 450 Barrels of Corn, which amounts to 315 *l.* and about 60 Barrels of Pork at 55 *s.* per Barrel, 165 *l.* total Amount 480 *l.* but she will not carry near the Amount of the Cargo that I have bought here, of which I must take Bills for the Remainder."

Letter of 22d May 1750.

One the 22d of the same Month the said James Mac-Nair wrote another Letter from Virginia to the Appellant Robert Mac-Nair, wherein he acquaints him that he hopes to sail in about Ten Days, and when at Barbadoes would write him.

8th of June 1750.
The Policy of Insurance in Question effected.

On the 8th of June 1750 the Appellant Robert Mac-Nair, by Mr. Stalker his Broker, caused a Policy of Insurance to be effected at Glasgow, filled up in the Name of the Appellant Robert Mac-Nair and Company (meaning his Son the said James Mac-Nair) in the usual Form, insuring against the usual Perils of the Sea, &c. upon the said Ship *Jean* and her Cargo for a Voyage from Virginia to Barbadoes; and the said James Mac-Nair is therein mentioned as Master of the said Ship; the Ship and her Cargo are therein valued at 1000 *l.* without any further Account to be given by the Assured to the Assurers or any of them for the same, according to which particular Sum all Losses were to be paid by the Underwriters proportionably to the several Sums by them underwritten; and the Assurers bind and oblige themselves, each for himself, conform to the Sums of Money annexed to their respective Subscriptions underwritten, their Heirs and Successors; and confess themselves paid the Consideration (or Premium) at the Rate of 1 *l.* 15 *s.* per Cent.—and it was thereby agreed that in case of any Loss there shall be an Abatement of 2 *l.* per Centum at Payment thereof.

This Policy of Insurance was underwrote by the Respondents Coulter and Bogle for 100 *l.* each, by the Respondents Graham and Cross for 200 *l.* each, by Archibald Ingram, James Spreul, and George Buchanan since deceased, for 100 *l.* each, and by One James Johnson for 100 *l.* so that the Sum of 1000 *l.* in the Whole was underwrote and insured by the said Policy of Insurance.

When this Policy of Insurance was effected, the Appellant Robert Mac-Nair did not produce to the Underwriters the said Letter he had received from his Son James Mac-Nair, dated the 7th of May 1750, wherein the Son informs him, that the total Value of his whole Cargo on board would not exceed 480 *l.* neither did the Appellant Robert Mac-Nair acquaint the Underwriters with the Kind of Vessel *The Jean* was, or that she, with her Boat and all her Tackle, &c. cost only 360 *l.* Sterling, although he was possessed of a full Knowledge of these Facts from his Son's said Letters of the 1st of November 1749 and 7th of May 1750, and from which he knew or was acquainted that the Value of both the Ship and all her Cargo would not exceed 840 *l.* Sterling.

On the 25th of June 1750 the said Ship *Jean* sailed from Hampton Road in Virginia with some Corn and other Merchandize on board on her said insured Voyage to Barbadoes, but having lost an Anchor and Cable she put back, and sailed again on the 27th of the same Month; on which Day the said James Mac-Nair wrote to his Father the following extraordinary Letter, which appears to be dated at Virginia; *viz.*

Letter of 27th June 1750.

" Honoured Sir,
" I Meeting with this Opportunity, thought it fit to acquaint you of my being in good Health, hoping that you and all the Family are in the same. I am here lying for a fair Wind, and all clear to sail, of which you have an Account of the Value of yours I have on board, and also of Baillie James Smith, *viz.* 4850 Bushels Indian Corn, at 4 *s.* per Bushel, and 45 Barrels Pork at 3 *l.* per Barrel, and 50 Barrels Tar at 32 *s.* 6 *d.* per Barrel, 8000 Barrel Staves at 7 *l.* per Thousand, and of Live Stock and other Goods to the Amount of 75 *l.* and the Value of the Vessel, which amounts to 787 *l.* odd Money Sterling, which in all amounts to 2104 *l.* 5 *s.* Sterling; and as I have done the utmost in my Power since I left you concerning your Goods and Baillie James Smith's, of which there is 145 *l.* of his to be deducted out of the above Sum, of which I have made Thomas Craig Master of the Brig *Jean* for Barbadoes, and then to Glasgow; and as he is a young Man, and I could get no other, you will please insure at least 1800 *l.* Sterling; and that you need not fear that it is more than the Value that I have on Board; neither delay any Time after you receive this Letter in getting Insurance, for if you do fail you may perhaps be a Sufferer; and acquaint Baillie James Smith concerning his Value, that in case the Vessel meet with any Accident,



“ Accident, that he need not blame me in not advising him; but be sure you do not neglect to insure the above Value of yours in Time, for there is an Island called *Bermudas* that lies betwixt *Virginia* and *Barbadoes* that I am very much afraid of, and that there is strange Notions runs into my Head that I will meet with some Accident about it, and I beg of you to lose no Time in insuring the Whole, as all is well yet.—Be sure that in case you mistake, and have any Doubt about the Master's Name is *Thomas Craig*, Master of *The Jean* Brigantine, her Burthen is about 114 Tons.—I wrote you before that I carried Command of her; but in case of Insurance, and any Misfortune happens, I being a young Man the Insurers might have reflected on me; but as I have put in a Man that has served his Time to the Sea, and being experienced that Way, they can make no Reflections, and I shall act every Thing as if the Whole was insured, and hopes, as before, you will lose no Time; and I will not fail in it, for I am very eager on Insurance, as we are all born to Misfortunes.”

And in a Postscript to this last Letter he adds,

“ When you receive this Letter, if you cannot get Insurance in *Glasgow*, be sure to write directly to *London*.”

It does not clearly appear on what Day the Appellant *Robert Mac-Nair* received this last Letter from his Son; but it is evident he received it previous to or on the 13th of *August* 1750, and had communicated it to Baillie *James Smith*; for, on the 13th of *August* 1750, the Appellant *Robert Mac-Nair* wrote a Letter to the said *James Mac-Nair*, wherein he acknowledged the Receipt of his Son's said Letter of the 27th of *June* 1750, and gives him very particular Instructions about making out his Invoice and Bills of Loading, in the following Words; viz. “ You'll be sure to write Mr. *David Currie*, Merchant in *London*, what Value you will have both of Ship and Cargo for our Account, and you'll also advise Mr. *David Currie* what Effects you will have of Baillie *Smith's*, so as he may make Insurance for him also; and what you order for him you'll mark *J. S.* and what you bring for us you'll mark *R. M.*—You'll take care your Invoice be clear, and send us a Copy of them by *London*, and also for any other Ship offering for our Place; we will not grudge the Postage of at least Three of them. I made Insurance from *Virginia* to *Barbadoes* for 1000*l.* and have wrote to Mr. *Currie* to insure what you write for, and have received his Advice that he will do it as soon as you advise him; and in case of any Misfortune, the Bills of Loading and the Invoice that you send by *London* or any other Ship will prove the Value lost.”

And on the 13th of *August* 1750 Baillie *James Smith* wrote a Letter to Mr. *David Currie* (named in the last stated Letter) wherein he desires Mr. *Currie* to make Insurance for him for 100*l.* Sterling for Goods on his Account from *Virginia* to *Barbadoes*, on Board *The Jean* Brigantine, *Thomas Craig* Master; and adds, “ I am advised she was waiting for a Wind and clear to sail the 27th of *June* last.”

The Appellant *Robert Mac-Nair* was not satisfied with the Insurance for 1000*l.* he had effected previous to his Receipt of his Son's said Letter of 27th of *June* 1750; for it is in Proof, that on the 19th of *August* 1750 he went to one Mr. *John Jamieson* of *Glasgow* in order to effect a further Insurance; but upon reading the Letter *Jamieson* answered, that considering the Contents of it he would not insure 100*l.* for 50*l.* Premium; and upon the said Appellant's asking the Reason, *Jamieson* replied, that the Goods were over-valued in the Letter, and that he did not like the Dreaming, which to him looked like a waking Dream.

This Answer and Refusal did not however put a Stop to the Appellant *Robert Mac-Nair's* attempting to effect a further Insurance; for on the next Day (20th of *August* 1750) he gave the following Order in Writing to the said Mr. *Stalker* his Broker for that Purpose, viz.

“ Goods aboard *The Jean* Brigantine, *Thomas Craig* Master.

“ 4850 Bushels Corn, at 2 <i>s.</i>	-	-	-	£.
“ 8000 Barrel Staves, at 40 <i>s.</i>	-	-	-	485
“ 45 Barrels of Pork, at 40 <i>s.</i>	-	-	-	16
“ 50 Barrels Tar, at 20 <i>s.</i>	-	-	-	90
“ Live Stock and other Goods	-	-	-	50
“ The Vessel	-	-	-	75
				787
				£. 1503

Mr.

" Mr. Andrew Stalker,

" Above is a Note of the Value of Ship and Goods freight, and of *The Jean* Brigantine,
 " Mr. Thomas Craig Master, from *Virginia* to *Barbadoes*, which I value at 1503 *l.* Sterling
 " when at *Barbadoes*; and desire you, as there is only 1000 *l.* Sterling insured, that you
 " get 350 *l.* more insured in the Terms you got the other 1000 *l.* done.—My last Advices
 " was dated *Virginia*, June 27th 1750; she was then clear to sail.

" Yours, Rob. Mac-Nair."

Under this Order Mr. Stalker effected a further Insurance for 350 *l.* on *The Jean* and her Cargo; but which he would not have effected, nor would any Insurer have underwrote it, had he been made acquainted of the Ship's having only cost 360 *l.* and with the Contents of the said Letters of the 7th of May and 27th of June 1750, or either of them, not only for the Reason hinted at by Mr. Jamieson, but because on being told how small the Vessel was, and what a trifling Sum she cost, and upon comparing the Appellant Robert Mac-Nair's Order to Mr. Stalker with both or either of the Son's Letters of the 7th of May and 27th of June 1750, the very great Difference between the Son's First and Second Letters as to the Quantity and Value of the Cargo, and the Difference made also by the Appellant Robert Mac-Nair even from both his Son's Letters by his Order to Mr. Stalker, were too striking not to draw the Attention of any Man, and deter him from becoming an Underwriter on a Policy where every Circumstance must inform him, or give him the strongest Reason to believe, that a Fraud was intended.—The Son by his Letter of the 7th of May says the Ship would carry only 450 Barrels of Corn and about 60 Barrels of Pork, and values his whole Cargo at 480 *l.* whereas by his dreaming Letter of 27th of June he says, he had on board her 4850 Bushels of Corn, 45 Barrels of Pork, and 50 Barrels of Tar, 8000 Barrel Staves, and Live Stock and other Goods to the Amount of 75 *l.* and he swells the Value of the Ship to 787 *l.* odd Money Sterling, and the whole Ship and Cargo (including to the Value of 145 *l.* which belonged to Baillie James Smith, and is not insured under the Policy now in Question) to 2104 *l.* 5 *s.* Sterling. This is so impossible to be credited, that even his own Father the Appellant Robert Mac-Nair could not believe it, although he testified his Inclinations to benefit by his Son's Misrepresentation; and for that Purpose, by his Order to Mr. Stalker for the further Insurance, he makes up another Account and Valuation, and sets the Ship and his Cargo at 1503 *l.* Sterling; and it is observable, that he values the Ship at 787 *l.* Sterling, whereas he then knew she did not cost above 360 *l.* Sterling, and was a very small Vessel, and incapable of stowing any Thing nigh such a Cargo as he and the Son represented.

Soon after this last Insurance was effected, the Underwriters on both Policies were called upon for a total Loss; it being alledged, that the said Ship *Jean* having struck upon the Rocks which lay out near upon the Island of *Bermudas* on the North-east Side thereof, the Crew thereupon left her, and landed in the Ship's Boat on the said Island, and that the Ship being there wrecked, she and all her Cargo was lost, save a few Trifles, which produced about 23 *l.* 7 *s.*

Bermudas being many Leagues out of the usual due Course of the Voyage from *Virginia* to *Barbadoes*, the Underwriters on both the said Policies of Insurance refused to pay the Loss; and the Appellant and Underwriters on the said last-effected Policy, whereon 350 *l.* was underwrote, having agreed upon a Reference, the Arbitrators, after examining the Evidence, Letters, and Papers, had no Difficulty in awarding the Appellant Robert Mac-Nair to deliver up this Policy to be cancelled; and it is more than probable that the Arbitrators on examining the Letters and Papers discovered better Grounds for making this Decision than the mere Deviation from or out of the Voyage insured.

The great Difference and Contradiction between the Contents of James Mac-Nair's said Letters to the Appellant Robert Mac-Nair of the 1st of November 1749, the 7th of May and 27th of June 1750, coupled with Proof of his greatly over-rating the Burthen of the Ship, so very considerably over-valuing both her and the Cargo, and representing the Cargo to consist of so much more than it actually did consist of, together with a vast Variety of other Circumstances respecting the Character and Conduct of James Mac-Nair (all of which are in Evidence in the present Cause) furnished the Underwriters on the Policy of Insurance in Question with the strongest Grounds to conclude that he had wilfully cast away the Ship and her Cargo; and therefore he was in March 1751 brought to a criminal Trial in the High Admiralty Court of *Edinburgh*; but it unfortunately happening that none of the Crew could be found out to give Evidence, except the Second Mate and a Boy, from whom every Thing during the Voyage had been industriously concealed, the Evidence was thought insufficient to induce

March 1751, James
 Mac-Nair tried for wil-
 fully casting the Ship
 away.

induce a Conviction ; and therefore *James Mac-Nair* was acquitted, though not very honourably, for the Jury returned the following Verdict, *viz.*

“ They unanimously find the Panel hath endeavoured to defraud the Insurers by giving Orders to insure a greater Quantity of Goods than the Ship *Jean Brigantine* could hold, and by putting a Value both upon his Ship and Cargo much higher than their real Worth ; but they are also unanimously of Opinion, that it was not proven that he wilfully cast away or destroyed the Ship and Cargo at the Time and Place libelled, or was Art and Part in so doing.”

The Fact found by the former Part of this Verdict, together with the Appellant. *Robert Mac-Nair's* Conduct in obtaining a further Insurance after he had received his Son's said Three Letters of the 1st of *November 1749*, 7th of *May* and 27th of *June 1750*, and what the Underwriters conceived to be a notorious Deviation, coupled with the very particular Instructions given by the Appellant *Robert Mac-Nair* by the said Letter of 13th of *August 1750* to his Son *James*, respecting his making up and sending home Invoices and Bills of Loading, induced them (the Underwriters) from a Principle of public as well as private Justice, to commence a civil Action in the same Court against the Appellant *Robert Mac-Nair* and his Son the said *James Mac-Nair*, to reduce or vacate the Policy in Question ; and thereupon the Appellant *Robert Mac-Nair* thought proper to commence a Counter Action in his own Name against the Underwriters to compel Payment from them of a total Loss under the said Policy of Insurance.

These Causes were carried on with great Spirit on both Sides, and various Questions were made by the Council in the Court below ; but the most material Questions were, 1st, Whether there was any Deviation from the due usual Course of the Voyage insured ? And if there was, then—2dly, Whether such Deviation was wilful or only accidental ? But supposing there was no wilful Deviation, then—3dly, Whether the Underwriters were liable to pay to the Appellant the full Sum of 1000*l.* under the Valuation in the Policy, or only so much as was the real, exact, and true Value of the Ship and Cargo insured ?—But it is to be observed, that this last Question never arose nor was made a Question by the Appellant till after the Hearing of the former Appeal hereafter mentioned.

A great Variety of circumstantial and positive Evidence was offered by both Parties in Support and Contradiction of these Questions ; but the Two First Questions respecting the Deviation have already been finally settled upon an Appeal brought on by the Underwriters about Two Years ago, as hereafter is mentioned, and therefore the noticing the Evidence relative to those Points is here omitted.

The Underwriters, as to the said Third Question, insisted, and still insist, that an Insurance is a Contract made for the Purpose of protecting the Property of an Adventurer in Ships and Trade from any Loss which may arise by the Perils of the Sea and other Perils insured against, on or for the particular Voyage specified in the Policy ; and if any Loss happens to the Object of the Insurance, the Assured is to be reimbursed by the Insurers to the Amount of the Prime or First Cost of the Thing insured ; that the Assured ought never to gain more than the real Value or Amount of his Loss ; nor should the Underwriter ever pay less than the Loss, according to the customary and settled Plan or Rule of adjusting Losses on Policies of Insurance practised in the Country or Place where such Policies are effected ; that an Over-valuation in a Policy carries with it the strongest Badges of a bad or ill Intent in the Assured, who never would pay a Premium for more than his real Property, unless he entertained some Doubts about the Integrity or Ability of the Captain of the Ship, or about the Ship, and proposed to benefit by a Loss ; that an Over-valuation is also contrary to the Spirit of the Act of the 19th of *George II.* which was made to prevent the pernicious Practice of making Insurances, Interest or no Interest, without further Proof of Interest than the Policy, or by Way of Gaming or Wagering, or without Benefit of Salvage to the Assurer ; and the Legislature seems to have had it in View by this Statute to correct two Evils, *viz.* The obtaining Insurances upon Ships and Cargoes in which the Assureds had no Interest, or if there was Interest the greatly over- valuing that Interest, which was a Temptation to the fraudulent Destruction of Ships ; and also, to oblige the Assured to produce Proof of Interest.

The Appellant *Robert Mac-Nair*, well knowing what was the customary Method of settling Losses at *Glasgow* upon Policies of Insurance, worded the same as that in Question, and clearly apprehending himself obliged to prove the Value of his Ship and Cargo, in order to ascertain the Quantum of the Loss to be paid by the Underwriters ; and the Underwriters possessed of

a full Knowledge of the said Custom of adjusting such Policies in *Scotland*, and therefore conceiving themselves not liable under the said Policy of Insurance to pay to the Appellant *Robert Mac-Nair* more than to the real and true Value and Amount of the Ship *Jean*, and such of her Cargo as did not belong to *Baillie James Smith*, after deducting the Salvage (being 23*l.* 7*s.*); both Parties under this Idea, and satisfied of its being the established Practice in *Scotland* for Underwriters on Policies worded as that in Question to pay no more than the real true Value or Amount of the Property insured, and to make a Return of Premium for short Interest in Cases where the Ships perfected their Voyages, and there turned out to be short Interest, have entered into Proof respecting the Value of both the Ship and the Cargo insured or covered by the Policy of Insurance now in Question; but it is to be observed, that this Evidence of Value was not before the Court of Admiralty when the Decreet of the 24th of *December* 1754, hereafter stated, was pronounced.

The Appellant *Robert Mac-Nair* hath endeavoured to fix the Value of the Ship and Cargo insured at 1434*l.* 4*s.* 3*d.* by producing a Bill of Loading signed by *Thomas Craig* as Master of the Ship, but who in Fact was Mate, and an Invoice appearing to be dated at *Virginia* the 16th *June* 1750, and signed by *James Mac-Nair*, as follows; viz.

" To 875 Barrels <i>Indian Corn</i> at 12 <i>s.</i> 6 <i>d.</i>	—	—	—	—	£. 546 17 6
" To 50 Barrels <i>Pork</i> at 45 <i>s.</i>	—	—	—	—	112 10 0
" To 50 Barrels <i>Tar</i> at 15 <i>s.</i>	—	—	—	—	37 10 0
" To 12000 Barrel <i>Staves</i> at 45 <i>s.</i>	—	—	—	—	27 0 0
" To 3000 <i>Heading</i> at 70 <i>s.</i>	—	—	—	—	10 10 0
" The <i>Jean</i> cost, Charges and Expences on her,	—	—	—	—	699 16 9
					£. 1434 4 3

The Underwriters on their Part insisted, and still do humbly insist, that the said Bill of Loading and Invoice were and are fictitious, and calculated by *James Mac-Nair* and his Mate *Thomas Craig*, who appears to be privy to and assisting *James Mac-Nair* in his bad Designs, to impose on them a Value greatly exceeding the real true Value; and that the Value of the Ship is clearly and indisputably fixed by the said *James Mac-Nair's* Letter to the Appellant *Robert Mac-Nair* dated 1st *November* 1749, by the Bill of Sale of the said Ship to him from Messieurs *Hutchins* and *Tucker*, wherein 450*l.* *Virginia* Currency (equal to 360*l.* *Sterling*) is the Consideration, and by the Oaths of *John Hutchins* and *John Tucker*, whereby they depose that they sold her to the said *James Mac Nair* for 450*l.* *Virginia* Currency.—And as to the Cargo; a Manifest thereof from the Naval Officer at *Virginia* is in Evidence, which shews that 2495 Bushels of Corn, 35 Barrels of Pork, 50 Barrels of Tar, and 5650 Barrel Staves, were actually shipped on board *The Jean* for the Voyage in Question.—And *John Hood*, who furnished the Cargo, hath positively deposed, that the Ship from her Construction could not stow or contain above 80 or 83 Tons of Cargo; and that he is certain she could not have contained One Half of the Goods mentioned in the Bill of Loading thereof produced by the Appellant, the Goods being represented therein as only Half a Ton short of 160 Tons: That *James Mac-Nair* told Deponent he had wrote to the Appellant to make Insurance on the Ship and Cargo to the Extent of 700*l.* *Sterling*, and thereupon Deponent said, that it was too high a Value, *James Mac-Nair* answered, that the same would be worth that or more when he came to *Barbadoes*.—And the said *John Hood* sets the Value of the whole Cargo actually shipped at 346*l.* 10*s.* 3*d.* *Sterling*.—In Confirmation of *John Hood's* Evidence, there are Affidavits made by *Robert Franks*, *Thomas Godfrey*, *John Hutchins*, and *John Tucker*, who all had either been Owners or had sailed between *Virginia* and *Barbadoes* as Master of *The Jean* before *James Mac-Nair* bought her; and they all prove, that her Burthen corresponded with the Evidence given by Mr. *Hood*.

24th December 1754.
Decreet of the Court of
Admiralty.

The only Question before the Admiralty Court being respecting the Deviation, On the Hearing of the Causes on the 24th Day of *December* 1754, the Court of Admiralty
"affoiled the Appellant *Robert Mac-Nair* from the Reduction, and decerned the Underwriters
"in Payment to him of the Sums by them severally underwritten, with a Discount of 2*l.*
"per Cent. in Terms of the Policy, and of 23*l.* 7*s.* *Sterling* as the acknowledged Value of
"what was recovered of the Wreck; and the Underwriters were further decerned in Payment
"to the Appellant *Robert Mac-Nair* of 83*l.* 1*s.* as the Expence of extracting the Decreet."

The Underwriters, being greatly surprized and dissatisfied with this Decree, exhibited a Bill of Suspension to the Court of Session; after which *James Mac-Nair* died, and as to him the Action abated, but it was afterwards revived against his Brother and Representative *Robert Mac-*

Mac-Nair junior; and after the Parties had entered into Evidence touching the Value of the Ship and Cargo, the Cause came on to be heard before the Lords of Session; when their Lordships, by a Majority of Six to Five, found the wilful Deviation not proved; and accordingly, on the 8th of *February* 1765, pronounced the following Interlocutor: "On the Report of the Lord *Auchinleck*, the Lords repel the Objections to the Policy of Insurance upon the Act of the 19th of his late Majesty; find it not proven that there was any wilful Deviation in the Voyage from *Virginia* to *Barbadoes*; find the Policy of Insurance does not in this Case oblige the Insurers to pay the Sums at which the Ship and Cargo were insured, but only the real Value of the Ship and Cargo; and find the Value of the Ship to be 450 *l.* *Virginia* Currency, being the original Price paid by *James Mac-Nair* for her, and as mentioned in *John Hood's* Oath.—Find that *James Mac-Nair's* Invoice is no Evidence of the Value of the Cargo; and with respect to that, and the other Points in the Cause, remit to the Lord Ordinary to proceed accordingly."

Against this Interlocutor even the Appellant *Robert Mac-Nair* thought proper to reclaim, because it restricted the Value of the Ship to 450 *l.* *Virginia* Currency; whereas he insisted, that there was sufficient Evidence of that Value amounting to 600 *l.* Currency.—The Underwriters also reclaimed against that Part of it, finding the Deviation not proved; and

Upon the 21st *June* following both these reclaiming Petitions came on to be heard; when, with respect to the Appellant *Robert Mac-Nair's* Petition, the Lords thought proper to refuse the Desire of it, and to adhere to their former Interlocutor.—But as to the Petition of the Underwriters, their Lordships were pleased to vary their former Opinion, and to find, "That with respect to the Deviation in the Voyage from *Virginia* to *Barbadoes*, no Action lies on the Policy of Insurance; and remitted it to the Lord Ordinary to proceed in the Cause accordingly."

This last Interlocutor the Underwriters apprehended to be agreeable to their Evidence, and the substantial Justice of the Case; yet the Appellant *Robert Mac-Nair* thought proper to present a Reclaiming Petition, which, being answered by the Underwriters, came on to be heard on the 7th of *August* 1765; when their Lordships, by a Majority of Seven to Six, pronounced an Interlocutor, "Finding it not proven that there was any wilful Deviation in the Voyage from *Virginia* to *Barbadoes*."—And upon the Underwriters reclaiming from this Interlocutor, their Lordships, on the 11th of *March* 1766, by a Majority of Six to Five, "adhered to their former Interlocutor, and refused the Desire of the Petition."

The said *George Buchanan* and *James Spreul*, Two of the Underwriters on the Policy in Question, died, and the Cause was revived against *Margaret, Jean, and Grizel Spreuls*, as Representatives of the said *James Spreul*, and against *Andrew Buchanan* as Representative of his Father the said *George Buchanan*.

From the said several Interlocutors of the 8th of *February* 1765, the 7th of *August* 1765, and the 11th of *March* 1766, so far as they reject the Evidence of an actual Deviation out of the due usual Course of the insured Voyage from *Virginia* to *Barbadoes*, the said *John Graham, James Coulter*, and the Representatives of the said *George Buchanan* and *James Spreul*, and also all the said other Underwriters on the Policy of Insurance in Question (except *James Johnson* who underwrote 100 *l.* thereon) appealed to the House of Lords; and in *March* 1770 the said Appeal came on to be heard, when the said Interlocutors of the Court below, so far as appealed against, were affirmed; but the Question agitated between the Parties upon that Occasion was so far from being clear in Favour of the now Appellant *Robert Mac-Nair*, that no Costs were given him upon that Appeal.

Afterwards the said *Archibald Ingram*, One of the said Underwriters, died, and the Cause was revived as against his Representative and Son *Archibald Ingram*, Merchant in *Glasgow*; and the said Action came again to be insisted on before the Lord *Auchinleck* Ordinary, and the Appellant *Robert Mac-Nair* moved his Lordship to ascertain the Sum for which the Underwriters were liable by the Policy, and after various Proceedings, his Lordship directed the Parties to give in mutual Informations to the whole Lords of Session.

This being done accordingly, on the 13th Day of *February* 1772 the Cause came on to be advised by their Lordships, when the Procurator for the Insurers having passed from the Objections of *Res Judicata*, and consented that the Court might judge in the Cause with respect to the Policy of Insurance being a valued Policy, as if the said Interlocutor of the 8th of *February* 1765 had not been pronounced or was still open; and averred and offered to prove that according

13th February 1772.
This Interlocutor is in
Part now appealed from
by both the Original
and Cross Appeals.

according to the invariable Practice of *Glasgow*, where this Policy was underwrote and where both Parties reside, Policies such as the present are not held valued Policies so as to relieve the Insured from the Necessity of proving both the Extent and Value of the Cargo; their Lordships without permitting the Insurers to give Evidence of the said Practice at *Glasgow*, on the said 13th Day of *February* 1772, pronounced an Interlocutor in the following Words; viz. "Upon Report of Lord *Auchinleck*, and having advised the mutual Informations and whole Proceedings in this Cause, the Lords find the Charger (Appellant *Robert Mac-Nair*) is not intitled to recover from the Suspenders (Respondents) the Thousand Pounds Sterling specified in the Policy, but only a Sum equal to the Damage he sustained by the Loss of the Ship *Jean* and her Cargo; find that in this circumstantial Case the Bill of Loading and Invoice, which last is only signed by *James Mac-Nair*, cannot be admitted as good Evidence neither of the Quantities nor Values of the Goods which were put on board said Ship in *Virginia*; but find that the Quantities must be held to be as ascertained by the Manifest of the Naval Officer, and the Values as ascertained by the Oath of *John Hood*, by whom the Goods were mostly furnished; find the Suspenders (Respondents) are also liable to make good the Value of the Ship as formerly ascertained, Expence of shipping the Goods and the Freight thereof from *Virginia* to *Barbadoes*, and likewise the Sum paid for the Insurance; but find that out of the Sums aforesaid the Suspenders (Respondents) are intitled to have Deduction of Two per Cent. in Terms of the Policy, as also to have Deduction of the Value of the Goods aboard *The Jean* which belonged to Mr. *Smith* to the Extent of 100 l. Sterling; and in the last Place find the Suspenders (Respondents) liable for the Interest of the Balance, after deducting as above from the Date of the Decree of the Admiral Court, and remit to the Lord Ordinary to proceed accordingly."

Original Appeal.

The Appellant *Robert Mac-Nair* hath appealed from the said Interlocutors of the 28th of *February* and 21st of *June* 1765, in so far as they restrict the Value of the said Ship *Jean* to 450 l. *Virginia* Currency, and find that the Policy of Insurance does not in this Case oblige the Insurers to pay the Sum at which the Ship and Cargo were insured; and also from the said Interlocutor of the 13th of *February* 1772, in so far as it finds the Appellant *Robert Mac-Nair* is not intitled to recover from the Respondents the 1000 l. Sterling specified in the said Policy, but only a Sum equal to the Damage he sustained by the Loss of the said Ship *Jean* and her Cargo, and finds that the Bill of Loading cannot be admitted as good Evidence of the Quantity of the Goods which were put on board the said Vessel in *Virginia*; but finds that the Quantities must be held to be as ascertained by the Manifest of the Naval Officer, and the Values as ascertained by the Oath of *John Hood*, by whom the Goods were mostly furnished; and also in so far as it finds the Respondents intitled to a Deduction of the Value of the Goods on board *The Jean* which belonged to Mr. *Smith* to the Extent of 100 l. Sterling; and in the last Place, in so far as it finds the Respondents only liable to Interest of the Sum due to the Appellant *Robert Mac-Nair* from the Date of the Decree of the Admiral Court.—But the Respondents (the Underwriters and Representatives of Underwriters) humbly hope the same will be affirmed (except in the Particulars complained of by their Cross Appeal) with Costs, for the following (among other)

R E A S O N S :

- I. For that Losses on Policies of Insurance are to be adjusted and paid by the Underwriters agreeable to the Mode or Rule observed in such Cases in the Country or at the Place where they are effected, in regard the Assured and Insurers are both supposed to have that in View when the Contract is entered into; and in the present Case, the Appellant *Robert Mac-Nair* hath himself admitted by his Proceedings, and entering into Evidence of the Value in the Court of Session, that the Policy of Insurance in Question is not considered in *Scotland* as a Policy which obliges the Underwriters to pay the whole 1000 l. and this is also confirmed by the repeated Determinations of the Lords of Session, who have thereby pointed out the Rule observed in *Scotland* in settling Losses on Policies of Insurance worded as that now in Question, to be, by allowing the Assured so far as to the full Amount of his Interest in the Ship and Cargo, which were the Objects of the Insurance.
- II. For that the Rule of adjusting Insurances which the Lords of Session have adopted, so far as it goes to the Value of the Ship and Cargo and Charges of making the Insurance, is agreeable to the Spirit of the said Statute of the 19th of his late Majesty, as it is most effectually discouraging the pernicious Practice of making Insurance for more Interest than the Assured really hath in the Thing insured; and therefore

therefore it is substantially adhering to the Intentions of the Legislature; and does complete Justice to the Appellant *Robert Mac-Nair*, by giving him a Satisfaction to the full Amount of the original Value and prime Cost of his Ship and Cargo and Expences of insuring them, which effectually answers the Purposes of an Insurance; and fully indemnifies him from any Loss that arose from any of the Perils insured against by the Policy.

III. For that in all Cases, allowing the Assured to recover from the Underwriters to the full Amount of the Valuation set by himself in his Policy, is giving the greatest Encouragement for Fraud; and this ought the rather not to be done in a Case circumstanced as the present, where it is evident both the Appellant *Robert Mac-Nair* and his Son *James* (who had the Command of and was interested in the Ship and Cargo) were contriving and planning Schemes to over-reach and impose on the Underwriters, by misrepresenting both the Value of the Ship and Quantity and Value of the Cargo; and there is no Doubt but that the Appellant *Robert Mac-Nair* hath by this Policy in Question valued Property at 1000 *l.* Sterling, which really and truly did not exceed the Value of 579 *l.* 2 *s.* 9 *d.* Sterling; for 450 *l.* *Virginia* Currency, the Price of the Ship at Par, is equal only to 360 *l.* Sterling, and deduct 145 *l.* for Mr. *Smith's* Property (at which it is fixed by *James Mac-Nair's* Letter of the 27th of June 1750) from 346 *l.* 10 *s.* 3 *d.* the Value of the whole Cargo, as by *John Hood's* Evidence, and it fixes the Appellant *Robert Mac-Nair's* Interest in the Cargo at 201 *l.* 10 *s.* 3 *d.* to which add 17 *l.* 12 *s.* 6 *d.* the Premium and Charges of effecting the Insurance, and the Whole of the said Appellant's Interest in both the Ship and Cargo is thereby clearly ascertained not to exceed 579 *l.* 2 *s.* 9 *d.* as aforesaid.

IV. For that the Underwriters upon every Policy of Insurance on which a Loss hath happened are entitled to the Benefit of Salvage; and therefore in the present Case the Insurers are clearly to have a proportionable Deduction of the 23 *l.* 7 *s.* being the Produce of what was saved of the Ship and Cargo; for if otherwise, it would be admitting the Policy of Insurance in Question to be void by the said Statute of the 19th of the late King, which expressly enacts, that no Insurance shall be made without Benefit of Salvage to the Assurer; and by the express Words of the Policy there is to be a Deduction of 2 *l.* *per Cent.* in case of Loss.

C R O S S A P P E A L.

THE Respondents, who are the Underwriters and Representatives of all the Underwriters on the Policy of Insurance in Question (except *James Johnson*) were advised, upon the Appellant *Robert Mac-Nair's* bringing his said Original Appeal, to bring a Cross Appeal against the said Interlocutor of the 13th of February 1772, inasmuch as it finds them conjunctly, and not severally and respectively, according and in Proportion to the said several and respective Subscriptions or Sums underwrote by the said *James Coulter*, *George Bogle*, *Archibald Ingram*, *James Spreul*, *John Graham*, *John Cross*, and *George Buchanan* on the said Policy of Insurance, liable to make good any Loss, or the Value of the said Ship and her Cargo and Freight, or any Interest, as therein specified and mentioned; and in so far as the Respondents are at all found liable for the Freight and for the Interest of the Balance, after deducting as is therein mentioned, from the Date of the said Decree of the Admiral Court; and humbly hope, that the said Interlocutor of the 13th of February 1772, so far as by them appealed from, will be reversed or varied, for the following (among other)

R E A S O N S:

I. For that by the Policy of Insurance in Question (as in all others) the Underwriters do not engage jointly and severally for the whole Amount of the Money insured or underwrote thereby, but only engage severally and respectively each for himself to the Amount only of the Sum and Sums by them respectively subscribed; so that to make them jointly liable for any Loss is not only expressly contrary to their Contract but to common Justice; and it is equally so, to allow the Appellant *Robert Mac-Nair*

Nair to cover and recover under this Policy the Freight which the Ship would have made on that Voyage had she performed it; for the Policy is on the Ship and Cargo only, not on the Freight; and if *Robert Mac-Nair* had intended to have insured the Freight, he ought to have pursued the Method which is daily practised, by effecting a Policy, in express Terms declaring it to be upon the Freight.

II. For that a Policy of Insurance is not a Contract which carries Interest for any Sum which the Underwriters may become liable to on account of a Loss; they engage only to be answerable for the Loss itself, not for any Interest for or upon such Loss; and it cannot be compared to a Bond, Note, or other Security, which upon the Face of them carry Interest or are payable on a Day certain, and therefore intitle the Obligee or Holder to recover Interest for his principal Money up to the Time of Payment; besides the Quantum of the Loss for which the Underwriters are liable remains even to this Day unsettled and unascertained.

III. For that there never was any Instance where an Assured recovered Interest from his Underwriters on an unadjusted Policy of Insurance contested in any of the Courts of Law at *Westminster Hall*; and in the present Case, the Questions between the Parties from the various Decisions evidently appear to have been such as (is submitted) well warranted the Underwriters to litigate Payment of the Loss demanded by the Appellant *Robert Mac-Nair*; and from the Complexion of the whole Transaction, great Difficulty in the Case, and various Decisions therein, the Underwriters humbly submit, that there seldom has happened a Case in which an Assured obtained a Recovery of his Loss, which intitled him to less Favour, or wherein an Assured had less Pretence to hope for more than he is strictly and legally intitled to recover, than in the present; or wherein the Underwriters could be better warranted in disputing a Loss which they are made liable for.

J. DUNNING.

FL. NORTON.

Did Since 15th Feby 1773

Ordered and Adjudged that the Interloc^y of the 8th of Feby and 21st of June as find that the Policy of Insurance does not in this Case oblige the Insurer to pay the Sum at which the Ship and Cargo were insured and so much of the Sum as the 13th of Feby 1772 as find that the Appell^t is not intitled to recover the Respond^t the £1000 Sterling specified in the Policy but only as to the Damage he sustained by the Loss of the Ship *Sean* and her Cargo. And it is Declared that the Appell^t is intitled to recover from the Respond^t the Sum by them severally underwritten and Interest thereon. Dated of the Decree of the Admiralty Court and of the Sum of £3, 11^s, 6^d the Expence of extracting the Decree in the said Court, with a Discount of 10^{cts} in Terms of the Policy and of £3, 7^s, 6^d Sterling as the app^r of what was recovered of the Wreck. And it is further Ordered that the Appeal be Dismissed: And that the Court of Session do give all proper Orders for carrying this Judgm^t into Execution.



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(except *James Johnson*) on } Cross Appeal.
the said Ship *Yean* and her
Cargo, - - - }

The CASE of the Respondents in
the Original, and Appellants in the
Cross Appeal.

To be Heard at the Bar of the House of Lords
on the Day of 1773.

Robert Mac-Nair, the Affured } Appellant in the
in a Policy of Insurance of } Original, and
for } Defendant in the